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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

Number 350

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TULLY B. KILLAM

Petitioner

v.

CITY OF FLORESVILLE

Respondent

■

**Petition for Writ of Certiorari to the
Court of Criminal Appeals of Texas**

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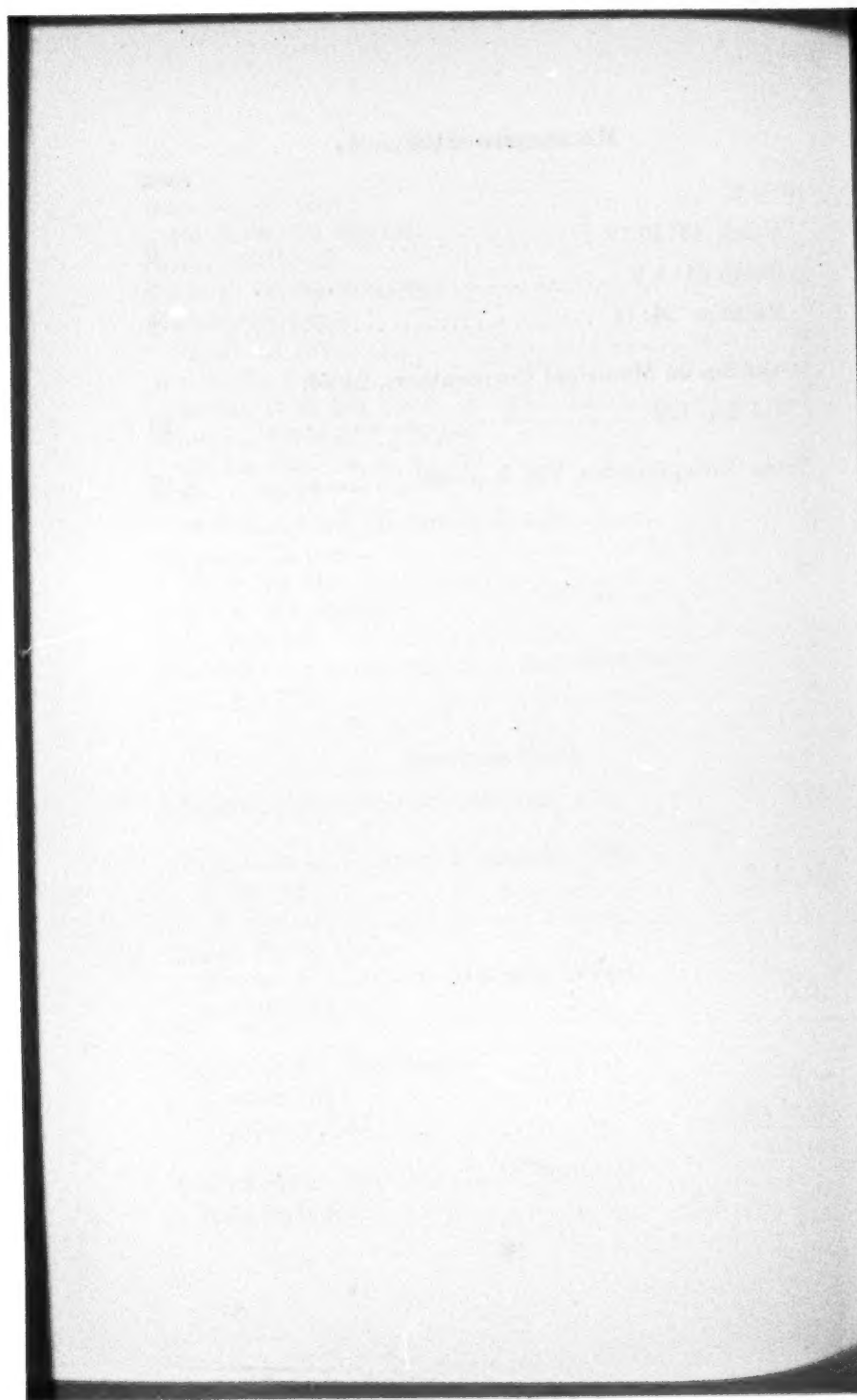
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TULLY B. KILLAM

Petitioner

v.

CITY OF FLORESVILLE

Respondent



Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

TO THE SUPREME COURT OF THE UNITED STATES:

Tully B. Killam, petitioner, presents this his petition for writ of certiorari and shows unto the Supreme Court of the United States the following:

A

Summary Statement of Matters Involved

1. *Preliminary Statement.*

With this petition are filed two companion cases, *Daisy Largent, petitioner, v. Jack Reeves, City Marshal, respondent*, and *Mrs. John Hilley, petitioner, v. Wid Spivey, Sheriff, respondent*, brought here also from the Court of Criminal Appeals of Texas. The city ordinances under which petitioners were convicted are essentially different in their terms. The Comanche ordinance in the *Hilley* case is a license tax law. The Floresville ordinance in this case prohibits and

makes unlawful peddling of literature on the public square and on any street within the city, being a prohibitory and not a regulatory ordinance, and does not provide for issuance of license or permit. The Paris ordinance in the *Largent* case is also prohibitory, prohibiting the sale of literature at all times in the main business sections of the city of Paris.

There is a common question in all three companion cases: That is the arbitrary discriminatory denial of the writ of habeas corpus, contrary to the Fourteenth Amendment to the United States Constitution, and the common question of a fictitious and colorless non-federal question which is intermingled with the federal question. These common questions make it appropriate to consider these three cases together. It is here requested that the Court read and consider the petition filed in this case, with supporting brief, together with the petitions and supporting briefs filed in the two above named companion cases. Although different disposition may be made in each of the three cases, it would conserve time of the Court to consider the three together.

The ordinance here involved, as construed by the Texas courts, is identical with the ordinance involved in Numbers 13, 18 and 29, October Term 1939, in the case styled *Schneider v. State*, 308 U. S. 147, and the holding of the Court of Criminal Appeals that the ordinance was valid on its face contradicts directly the holding by this Court in *Schneider v. State*, *supra*.

Under the practice allowable and established by the Court of Criminal Appeals of Texas, habeas corpus cases in a conviction of this sort are reviewable by the Court of Criminal Appeals if the ordinance is unconstitutional on its face, as construed by the Texas courts. It is admittedly unconstitutional and void on its face, under the *Schneider* case, *supra*; therefore the purported non-federal question relied upon in the Court of Criminal Appeals in the disposition of this case is fictitious and resorted to for the

sole purpose of denying petitioner his constitutional rights, in violation of the equal protection and due process clauses of the Fourteenth Amendment.

2. Statutory Provision Sustaining Jurisdiction.

Section 240 (a) of the Judicial Code, 28 U. S. C. A. 347 (a) sustains jurisdiction.

3. Validity of the City Ordinance and the State Statute Drawn in Question.

The ordinance in question is that of the City of Floresville,¹ Texas, which reads as follows:

“AN ORDINANCE PROHIBITING THE PEDDLING AND SELLING OF MERCHANDISE WITHIN THE CORPORATE LIMITS OF THE CITY OF FLORESVILLE, TEXAS.

“Be it Ordained by the City Council of the City of Floresville, Texas:

“SECTION 1. That it shall hereafter be unlawful for any person to peddle any kind of merchandise, patent medicine, nostrum, on the public square or on any street within the corporate limits of the City of Floresville, Texas.

“SECTION 2. Any person who shall violate any provision of this ordinance shall upon conviction be fined in a sum not less than One (\$1.00) Dollar and not more than Twenty-five (\$25.00) Dollars.

“This ordinance to become effective from and after its final passage, and adoption and legal notice thereof given.

“The fact that there is now no ordinance in the City of Floresville, Texas, prohibiting the peddling and selling of merchandise within the corporate limits of the said city, this ordinance is declared an emergency

¹ The City of Floresville is a country town in southwestern Texas, 32 miles south of San Antonio, in the truck gardening district, its population being 1,708.

and shall take effect from and after its passage and approval."

R. 6

The State statute, the validity of which is drawn in question, is Article 53 of the Code of Criminal Procedure of Texas, 1925, reading as follows:

"The Court of Criminal Appeals shall have appellate jurisdiction co-extensive with the limits of the State in all criminal cases. This article shall not be so construed as to embrace any case which has been appealed from any inferior court to the county court or county court at law, in which the fine imposed by the county court or county court at law shall not exceed one hundred dollars."

4. Date of Judgment and Order to be Reviewed.

The order remanding petitioner to custody was affirmed by judgment of the Court of Criminal Appeals entered on April 8, 1942, (R. 9) Petitioner duly filed his motion for rehearing on April 17, 1942, (R. 9) and judgment overruling the motion was duly entered on June 3, 1942. (R. 13) Time for filing petition for certiorari expires September 3, 1942. Petition is filed within such time.

5. Time and Manner in which Questions Raised Below.

In the application for writ of habeas corpus filed by petitioner in the County Court of Wilson County, the petitioner alleged that the ordinance in question, as construed and applied to him, was violative of his constitutional rights to worship Almighty God and of his right to carry on his "press activity" and that by virtue thereof he was illegally restrained of his liberty. R. 4.

This was sufficient under the procedure of Texas to raise the constitutional question; for if a law is unconstitutional, according to the procedure of Texas, its unconsti-

tutionality can be raised at any time without specific allegation and can be raised for the first time before the Court of Criminal Appeals on appeal.²

The allegation in the petition for writ of habeas corpus, that one is illegally restrained of his liberty, is sufficient, according to Texas procedure, to raise any question on argument, either in the trial court or the Court of Criminal Appeals.³ This was a sufficient raising of the federal question under the doctrine of this Court in *People of New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 66-69, where this Court said:

"There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the *record* as a whole shows either expressly or by clear intendment that this was done the claim is to be regarded as having been adequately presented."

Please note that in the foregoing *Bryant* case the petition for writ of habeas corpus did not attack the statute as being invalid or unconstitutional but merely that the printed briefs set forth "the points to be relied upon"; the record was entirely devoid of any expressed allegation of any unconstitutionality in that case. However, in the Court of Criminal Appeals of Texas under Point One of the Propositions upon which the appeal was predicated, the ordinance is attacked as being unconstitutional. (R. 15, 16) In the *Bryant* case, *supra*, the New York practice did not require

² *City of Amarillo v. Tutor*, 267 S. W. 697, 199 S. W. 352; *Hoffman v. State*, 20 S. W. 2d 1057; *Burnes v. State*, 75 Tex. Cr. Rep. 188, 170 S. W. 550; *Gohlman, etc. v. Whittle*, 273 S. W. 808. Texas Jur., Vol. 9, page 469.

assignments of error specifically attacking the validity of the law. It is to be noticed here that the Court of Criminal Appeals of Texas does not require assignments of error.³

Petitioner did not appeal to the County Court of Wilson County from the judgment of conviction rendered against him in the Corporation Court of Floresville, but, on the contrary filed his application for writ of habeas corpus with the County Court, which is proper. It is not necessary under the law of Texas where the ordinance is unconstitutional to appeal to the County Court, but an application for writ of habeas corpus can be immediately presented by the one thus convicted in the Corporation Court, which is allowed him by law as a matter of right. In such instances the Court of Criminal Appeals holds that habeas corpus is the proper remedy and it is not necessary to take an appeal from the Corporation Court to the County Court.⁴

At the hearing of the application for writ of habeas corpus in the County Court no contention was raised as to the writ of habeas corpus not being available. The right to such writ was admitted in the County Court. The writ was discharged because the County Court believed the ordinance to be constitutional and that petitioner was not denied his constitutional rights.

In the Court of Criminal Appeals petitioner contended, under Proposition 3, that habeas corpus was the proper remedy and that such court had the power to review the case by appeal, because the ordinance was unconstitutional on its face and as construed and applied. R. 15, 16.

The majority opinion of the Court of Criminal Appeals over the protest of the minority opinion, for the first time in these proceedings raised the contention that Article 53 (C. C. P. of Texas) in cases such as this, deprived the Court of Criminal Appeals of its appellate jurisdiction in habeas

³ *Wings v. State*, 98 S. W. 2d 210, 131 T. C. R. 188.

⁴ See *Ex parte Patterson*, 42 Tex. C. R. 256, 58 S. W. 1011; *Ex parte Roquemore*, 131 S. W. 1101; *Ex parte Baker*, 78 S. W. 2d 610; *Ex parte Lewis*, 45 Tex. C. R. 1, 73 S. W. 811.

corpus cases conferred upon it by Article 857 (C. C. P. of Texas). R. 8. See opinion in *Largent* case.

Under grounds 3 and 5 of the motion for rehearing filed in the Court of Criminal Appeals,⁵ petitioner attacked the validity of Article 53 (C. C. P. of Texas) as construed and applied by that Court on the grounds that it violated the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, in denying the writ of habeas corpus, an inherent right guaranteed by the Fourteenth Amendment. The Court of Criminal Appeals admits that it has the duty to take original jurisdiction or appellate jurisdiction in habeas corpus cases where one is convicted under an ordinance found to be unconstitutional on its face. That court for the first time held that the power did not exist if the ordinance was unconstitutional as applied, and affirmed on this ground.* The action of the Court of Criminal Appeals is a subterfuge to deny the petitioner his constitutional rights of freedom of press and of worship of Almighty God. R. 8. See opinion in *Largent* case.

6. *Opinions of the Courts Below.*

The trial courts did not render or file opinions. The Court of Criminal Appeals' opinion and dissenting opinion of Judge Graves, are reported in 162 S. W. 2d 426. (R. 8, 9) The majority opinion and dissenting opinion in the companion case of *Ex parte Largent* are reported in 162 S. W. 2d 419. See *Largent* Record, pages 24-35.

⁵ This was timely because the Court of Criminal Appeals urged the point for the first time in the majority opinion on April 4, 1942. See *Brinkerhoff-Faris T. & S. Co. v. Hill*, 281 U. S. 673, 678-682.

* Compare Court of Criminal Appeals words in *Ex parte Baker*, 127 Tex. C. R. 589, 78 S. W. 2d 610, 613, to wit: "It is a familiar rule that the validity of an act is to be determined not alone by its caption and phraseology, but also by its practical operation and effect." In this case the writ was sustained.

7. *Statement of Facts.*

Pertinent parts of the complaint filed in the Corporation Court under which petitioner was tried and convicted are:

"T. B. Killam on (or about) the 31st day of May, A. D. 1941, and before the making of this complaint, in Wilson County, and State of Texas, did then and there unlawfully and wilfully peddle merchandise, to-wit: books and magazines within the corporate limits of the city of Floresville, Texas, contrary to an ordinance passed by said city on the 12th day of April, A. D., 1940."

R. 1.

The evidence showed that petitioner was an ordained minister of Jehovah God, one of Jehovah's witnesses, sent forth to preach the Gospel of God's Kingdom by means of distributing literature explaining the Bible prophecies. In the trial court he quoted Isaiah 61: 1, 2, reading as follows:

"The Spirit of the Lord God is upon me; because the LORD hath anointed me to preach good tidings unto the meek: he hath sent me to bind up the broken-hearted, to proclaim liberty to the captives, and the opening of the prison to them that are bound; to proclaim the acceptable year of the LORD, and the day of vengeance of our God; to comfort all that mourn."

Isaiah 43:10-12, as follows:

"Ye are my witnesses, saith the LORD, and my servant whom I have chosen; that ye may know and believe me, and understand that I am he: before me there was no God formed, neither shall there be after me. I, even I, am the LORD; and beside me there is no saviour. I have declared, and have saved, and I have shewed,

when there was no strange god among you: therefore ye are my witnesses, saith the LORD, that I am God."

and he also read to the Court Matthew 24:14:

"And this gospel of the kingdom shall be preached in all the world for a witness unto all nations: and then shall the end come."

R. 2.

It was stipulated that petitioner was thus preaching the Gospel on the streets of Floresville at about two o'clock Saturday afternoon, May 31, 1941, at which time he was arrested and charged with a violation of the aforesaid ordinance by Ed. McDaniel, city marshal. Petitioner was taken to jail, thereafter tried in the Corporation Court, at which the above testimony was given. R. 1-3.

On June 2, 1941, in the Corporation Court judgment was entered against him, imposing a fine in the amount of \$10 and costs of \$29.75, or in the alternative committing him to the jail until fully paid. R. 3.

The application for writ of habeas corpus was filed in the County Court on June 2, 1941. R. 4.

Thereafter on June 2, 1941, hearing was had on the application for writ of habeas corpus and the same denied and petitioner remanded to the custody of said city marshal Ed. McDaniel. (R. 7) Notice of appeal to the Court of Criminal Appeals was duly given (R. 7) and said appeal perfected. R. 7.

The cause was duly briefed and argued in the Court of Criminal Appeals on November 17, 1941, where petitioner contended that the ordinance was unconstitutional both on its face and as construed and applied, because it discriminated against the business of selling or peddling from house to house, beyond the reach of the police power and also denying petitioner his right of freedom of press and of worship of Almighty God, all contrary to the due process

and equal protection clauses of the Fourteenth Amendment to the United States Constitution. R. 10-12, 15, 16.

The Court of Criminal Appeals wrongly held the ordinance to be constitutional on its face and refused to consider the question as to whether or not it was unconstitutional on its face and refused to consider the question as to whether or not it was unconstitutional as construed and applied, relying upon a fictitious and colorless non-federal ground of procedure in conflict with other decisions of the Court of Criminal Appeals. This *so-called* non-federal ground is so intermingled with the federal question as to require the consideration thereof on review by this Court.

B

Questions Presented

By reason of the foregoing, there were seasonably presented to the courts below and there now are presented to this Court for review substantial federal questions as follows:

1. Is the ordinance in question unconstitutional and void on its face because it prohibits and makes illegal that which is inherently lawful, to wit, the business of peddling and selling within the city, in excess of the police power and thereby discriminating against that type of business, contrary to the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution?

2. Is the ordinance in question, as its terms are construed by the Texas courts so as to include distribution of literature in preaching the Gospel, unconstitutional and void on its face and as so construed and applied, because it expressly prohibits absolutely the exercise of the rights of freedom of the press and freedom to worship Almighty God, contrary to the First and Fourteenth Amendments to the United States Constitution?

3. Does Article 53 of the Code of Criminal Procedure of Texas, 1925, as construed and applied by the Court of Criminal Appeals of Texas, unduly deny petitioner his right to the inalienable and inherent writ of habeas corpus, in violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution?

4. Did the Court of Criminal Appeals of Texas err in affirming the judgment of the trial court, remanding petitioner to custody of respondent?

C

Reasons Relied on for Allowance of Writ

This petition for writ of certiorari should be granted in sound discretion of this Court because the Court of Criminal Appeals and the trial court have decided important questions of constitutional law in a manner not applicable to and in conflict with decisions of this Court in the cases of *Schneider v. State*, 308 U. S. 147, and *Hague v. C.I.O.*, 307 U. S. 496, 501, 518. The ordinance in question is unconstitutional because it is an outright prohibition of the right to distribute literature containing information and opinion.

It is to be noticed that in the cases of *Ex parte Slawson*, 141 S. W. 2d 609, 610, *Ex parte Lewis*, 147 S. W. 2d 478, *Ex parte Jones*, 81 S. W. 2d 706 and *Ex parte Spelce*, 119 S. W. 2d 1033, 1037, that the Court of Criminal Appeals did not hold that it did not have jurisdiction. On the contrary, the matter of the contentions advanced were discussed and the cases were decided on their merits, and judgments were entered, disposing of the cases on their merits. The judgment here entered disposed of the case on the merits and not on jurisdictional grounds, therefore the entire discussion of the opinion to the effect that the court does not have jurisdiction is immaterial since the

judgments of the trial courts were affirmed holding that petitioner was not denied his liberty in violation of the Constitution.

The questions presented as to the validity of the ordinance in question and the right to the writ of habeas corpus are of national importance and seriously affect the fundamental civil and personal rights of every person in the United States. The Court of Criminal Appeals of Texas has so far departed from the accepted and usual course of judicial procedure and decided an important federal question in an arbitrary and evasive manner as to call for the exercise of this Court's power of supervision to halt the same.

As further reasons why this petition for writ of certiorari should be granted, we refer to petition for writ of certiorari in the *Hilley** and *Largent* cases and to the entire dissenting opinion of Judge Graves of the Court of Criminal Appeals in the companion *Largent* case, and make the same a part hereof as though copied at length herein. (R. 9) See the Record in the *Largent* case, pages 28-35.

WHEREFORE your petitioner prays that this Court issue a writ of certiorari to the Court of Criminal Appeals of Texas directing such court to certify to this Court for review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and that the decree of the said court affirming the judgment of the trial court be reversed and the judgment of the trial court be reversed and that

* The non-federal question involved in these three cases is best discussed in the *Hilley* case.

your petitioner may have such other and further relief in the premises as to this Court may seem just and proper under the circumstances.

TULLY B. KILLAM,

Petitioner

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